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Surentheran a/l Selvaraja v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09-15 OF 2002

B ALAUDDIN, ABDUL AZIZ MOHAMAD, AND NIK HASHIM JJCA
10 MARCH 2005

Criminal Law — Dangerous drugs — Possession — Drugs found in accused's car on the floor of the driver's section — Whether possession proved — Dangerous Drugs Act 1952 s 12(2)

C

Criminal Procedure — Sentence — Dangerous drugs, possession of — Whether 10 years imprisonment for possession of 6.44g drugs excessive — Dangerous Drugs Act 1952 s 12(2)

D

The appellant was stopped while driving alone and a plastic bag containing 6.44 gm of dangerous drugs were found on the floor of the driver's section of the car. The sessions court judge found that there were direct evidence of possession and

E convicted the appellant of the offence under s 12(2) of the Dangerous Drugs Act 1952 and sentenced him to 10 years imprisonment and the mandatory ten strokes of whipping. The High Court dismissed his appeal against conviction and sentence. He appealed to this court. The appellant submitted that on the facts there was no evidence of knowledge that was required to constitute possession. The issue was whether, from the circumstance that the bag was on the floor of the driver's side of

F the appellant's car which he was driving alone, it would be correct to conclude, as a matter of inference, that it was beyond reasonable doubt that the appellant knew that the bag contained the packets and that the packets contained the dangerous drugs. The appellant also submitted that the term of 10 years imprisonment was excessive in view of the amount of drugs involved.

G

Held, dismissing the appeal on conviction and reducing the term of imprisonment to seven years:

H (1) There is, if at all, very seldom available direct proof of the knowledge that is necessary to constitute possession. In almost every case, proof of knowledge has to be by way of inference from the proven circumstances. One set of circumstances differs from another. In any given case, whether knowledge is inferable depends on the particular circumstances of the case and a proper appreciation of them. The court has to look at the particular circumstances of

I this case and assess them independently, without being influenced by what may have been decided in some other case under a different set of circumstances (see para 10).

(2) In the present case, the inescapable inference from the fact that the bag was so placed in relation to the appellant in the car could only be that he knew of the

existence of the bag. From the fact that it was his own car that he was driving and that there was no one else in the car, the inescapable inference was that he alone was concerned in the presence of the bag in the car. From the fact that he needed to guard the bag, the inescapable inference was that he knew that the bag contained packets of the dangerous drugs. The sessions court judge was right in finding at the close of the prosecution case that the prosecution had established possession by evidentiary proof (see para 11).

(3) Even if the proven circumstances were insufficient as proof of knowledge, the court would apply the presumption of s 37(d). The appellant had in his custody or in his control the bag and the packets containing the drugs. The presumption is a mandatory although rebuttable presumption. It has to be applied where the facts on which to base it are established, except in a capital charge of trafficking that relies on the statutory presumption of trafficking (para 12).

(4) There seems to be a statutory policy of grading the severity of penalty according to the amount of drug. Bearing that in mind, no matter how important are such questions as that of public interest, in a case that does not have aggravating or suchlike circumstances, such as a previous conviction — and the appellaant did not have a previous conviction – the sentence of imprisonment must, as far as possible, though not necessarily with mathematical accuracy, be made to adhere to that policy (see para 15). Therefore, the term of imprisonment was reduced to seven years (see para 18).

[Bahasa Malaysia summary

Perayu ditahan semasa memandu seorang diri dan sebuah beg plastik mengandungi 6.44g dadah merbahaya telah ditemui di lantai bahagian pemandu kereta itu. Hakim mahkamah sesyen mendapati bahawa terdapat keterangan langsung milikan dan mensabitkan perayu dengan kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952 dan menjatuhkan hukuman 10 tahun penjara dan sepuluh kali sebatan mandatori ke atas beliau. Mahkamah Tinggi telah menolak rayuan beliau terhadap sabitan dan hukuman. Beliau telah merayu ke mahkamah ini. Perayu menghujahkan bahawa berdasarkan fakta-fakta, tiada keterangan tentang pengetahuan yang diperlukan untuk membentuk milikan. Persoalan sama ada, berdasarkan keadaan di mana beg itu terdapat di lantai bahagian pemandu kereta perayu yang beliau sedang memandu sendirian, adalah betul untuk membuat kesimpulan, berdasarkan inferens, bahawa ia adalah melampaui keraguan munasabah bahawa perayu mengetahui yang beg itu mengandungi paket-paket dan yang paket-paket itu mengandungi dadah berbahaya. Perayu juga berhujah bahawa tempoh 10 tahun penjara adalah melampau berdasarkan jumlah dadah yang terlibat.

Diputuskan, menolak rayuan atas sabitan dan mengurangkan tempoh penjara kepada tujuh tahun:

(1) Jarangkali terdapat, jikapun ada, bukti pengetahuan langsung yang perlu untuk membentuk milikan. Hampir dalam setiap kes, bukti pengetahuan hendaklah melalui inferens daripada keadaan yang dibuktikan. Satu set keadaan berbeza

dengan yang satu lagi. Dalam satu kes, sama ada pengetahuan itu berdasarkan inferens bergantung kepada keadaan tertentu kes dan penghayatan yang betul mengenainya. Mahkamah perlu melihat keadaan tertentu ke ini dan menilainya secara berasingan, tanpa dipengaruhi oleh apa yang mungkin telah diputuskan dalam kes lain di bawah set keadaan yang berbeza (lihat perenggan 10).

(2) Dalam kes semasa, inferens yang tidak boleh dielakkan daripada fakta adalah bahawa beg itu terletak di tempat di mana perayu dalam kereta pasti dapat mengetahui tentang kewujudan beg itu. Berdasarkan fakta bahawa ia keretanya sendiri yang beliau pandu dan bahawa tidak ada sesiapa lagi dalam kereta itu, inferens yang tidak dapat dielakkan adalah bahawa beliau seorang sahaja yang berkaitan dengan kehadiran beg dalam kereta itu. Berdasarkan fakta yang beliau perlu mengawasi beg itu, inferens yang tidak dapat dielakkan adalah bahawa beliau mengetahui bahawa beg itu mengandungi paket-paket dadah berbahaya. Hakim mahkamah sesyen adalah betul dalam penemuannya di penutup kes pendakwaan bahawa pihak pendakwaan telah membuktikan milikan melalui bukti keterangan (lihat perenggan 11).

(3) Jikapun keadaan yang dibuktikan itu tidak memadai sebagai bukti pengetahuan, mahkamah akan menggunakan anggapan s 37(d). Perayu mempunyai dalam milikan atau kawalan beliau beg dan paket-paket yang mengandungi dadah itu. Anggapan itu adalah mandatori meskipun ia anggapan yang boleh dipatahkan. Ia telah digunakan di mana fakta-fakta yang diasaskan telah dibuktikan, kecuali dalam pertuduhan kesalahan besar mengedar dadah yang bergantung kepada anggapan statutori pengedaran (lihat perenggan 12).

(4) Kelihatan seperti ada polisi statutori menggredkan keseriusan penalti berdasarkan jumlah dadah. Perlu diingat, tidak kira betapa pentingnya persoalan berhubung kepentingan awam, dalam suatu kes yang tidak mempunyai keadaan yang teruk atau sepertinya, seperti sabitan sebelumnya — dan perayu tidak mempunyai sabitan sebelumnya - hukuman penjara hendaklah, setakat mana mungkin, meskipun bukan dalam ketepatan matematik, dibuat sebagai mematuhi polisi itu (lihat perenggan 15). Oleh itu, tempoh penjara telah dikurangkan kepada tujuh tahun (lihat perenggan 18).]

Notes

For cases on Dangerous Drugs Act 1952 s 12(2), see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 151–152.

For cases on sentence for possession of dangerous drugs, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3348–3355.

Cases referred to

Kesavan a/I Petchayo @ Balakrishnan v PP [2003] 2 MLJ 209 (refd)

Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)

Toh Su Kuan v PP (Rayuan Jenayah No D–05–82 of 1998, Court of Appeal) (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(da)(iiia), 39A(1)(d), 39A(2)(d)

Appeal from: Criminal Appeal No 42–47 of 2001 (High Court, Kuala Lumpur)

Karpal Singh (Karpal Singh & Co) for the appellant.

Lee Lay Choo (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Abdul Aziz Mohamad JCA (delivering judgment of the court):

[1] The appellant was convicted in the Sessions Court in Kuala Lumpur of the offence under s 12(2) of the Dangerous Drugs Act 1952 of unlawful possession of 6.44g of a mixture of heroin and monoacetylmorphines and was sentenced under s 39A(2) to ten years imprisonment and the mandatory minimum ten strokes of whipping. The High Court dismissed his appeal against conviction and sentence. He now appeals to this court. The appeal is also as regards conviction and sentence.

[2] On the evening of 13 July 2000, the appellant was driving, with no one else with him, a Proton Saga Aeroback motor car, of which he had been the registered owner since 1999, when at about 8.30, he stopped in front of the Maybank building in Kampung Baru, Kuala Lumpur, and was pounced upon by the police who were on the lookout for him. In the motor car, on the floor of the driver's section, was found a red plastic bag containing 40 small plastic packets in four bundles, each of ten packets held together by a rubber band. The packets contained the drugs in powder and granular form.

[3] There were two photographs that had been tendered as exhibits in the sessions court but were not included in the appeal record. We obtained these subsequent to the hearing of the appeal. Photograph P1C is one where the leader of the police party, Inspector Mohd Azam, had marked with an X the position in the car where the plastic bag was found. Photograph P1D is a photograph of the plastic bag, the 40 plastic packets and the four rubber bands. From photograph P1D we observe that the bag was a simple bag made of thin light plastic, the kind that shopkeepers provide for customers to carry away groceries or household provisions in. From the marking X in photograph PIC and the size of the bag as we judge it from photograph P1D, we conclude that the bag would have been between the feet of the appellant were the appellant to be seated normally in the driver's seat with legs straight down and not stretched out towards the pedals and would have fully occupied the space between the two feet.

[4] After the close of the case for the prosecution, the learned DPP submitted that those facts (and another which we will mention later on) constituted evidence that the appellant had custody or control of the 40 plastic packets and also knowledge that they contained the drugs and that therefore there was proof of possession. He further submitted that if the court was unable to find possession by direct evidence, he relied on the presumption under s 37(d), which provides that in all proceedings under the Act:

any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

The learned sessions court judge, as appears from her grounds of judgment, found, on those facts, that there was direct evidence of possession. She did not invoke the presumption. She accordingly called upon the appellant to enter upon his defence, at the end of which she convicted him.

[5] Before us, Encik Karpal Singh for the appellant presented only one argument against conviction, namely that on the facts there was no evidence of the knowledge that was required to constitute possession. In effect his argument was that the facts did not necessarily justify the inference of knowledge. In relation to this argument, he particularly pointed out that it was a misdirection for the sessions court judge to take into consideration, as tending to show knowledge, the fact of the appellant's remaining silent when the bag was opened and the packets were shown to him just after the bag was found.

[6] Actually the sessions court judge did not, in finding knowledge, take the evidence of the appellant's negative conduct of remaining silent into consideration. Although at the top of p 6 of her grounds of judgment she did refer to that evidence, it is clear to us that in the last paragraph on that page, where she made her finding as to knowledge, she did not take the evidence of the appellant's negative conduct into consideration. It was the appellate judge in the High Court who, at pp 23 and 24 of his grounds of judgment, particularly in paragraph (iv) a p 24, said that the trial judge also took that evidence into consideration in finding a prima facie case. That was an error.

[7] Indeed, during the trial itself the prosecution never sought to rely on the evidence of negative conduct of silence in order to prove knowledge. The evidence of the negative conduct emerged only in the cross-examination of Inspector Mohd Azam, in his answer to the question whether the appellant admitted the drugs were his. Counsel merely wanted confirmation that the appellant did not so admit — which was absolutely unnecessary because it was never said that he did — and the confirmation was given by the answer that the appellant was silent when the bag was opened. Later on, also in cross-examination, the Inspector said that when the drugs were shown to the appellant at any time, he did not admit it was his. That again must have been in response to counsel's efforts to obtain similar confirmation. On the contrary, what the prosecution relied on was evidence of positive conduct of the appellant's being in a state of fear when the car door was opened. This emerged in the examination-in-chief of Inspector Mohd Azam. And in submission at the close of the prosecution case the DPP said that the appellant's being 'gamam dan terkejut' meant that he had knowledge. It was never submitted that the negative conduct of being silent meant that the appellant had knowledge. But in the appeal before us, the learned DPP did not rely on the evidence of positive conduct as one of the factors from which knowledge could be inferred. She instead relied on the evidence of negative conduct of remaining silent as one of the factors, which was not fair since such evidence was not relied on during the trial.

[8] So we have to exclude the negative conduct of remaining silent from our minds and consider only the other factors. The question to be answered is whether, from the circumstance that the bag was in the position as already described on the floor of the driver's side of the appellant's car which he was driving without any other occupant, it would be correct to conclude, as a matter of inference, that it is beyond reasonable doubt that the appellant knew that the bag contained the packets and that the packets contained the dangerous drugs.

[9] In arguing against the finding, made at the close of the case for the prosecution, of knowledge and therefore of possession, Encik Karpal Singh relied on the decision of this court in *Toh Su Kuan v Pendakwa Raya* (Rayuan Jenayah No D–05–82 of 1998) where the circumstances were very much stronger against the appellant in that case than those in this case and this court held that they were insufficient to constitute proof of possession. The appellant in that case was charged with the capital offence of trafficking in 1,584.93g of heroin and was sentenced to death in the High Court. The evidence for the prosecution was that the drug was found in 356 packets in different parts of the appellant's person: 62 packets in the left shoe, 60 packets in the right shoe, 57 packets strapped to the left shin, another 57 packets strapped to the right shin, 60 packets tied to the waist in front and 60 packets fastened to the waist at the back. This was what Gopal Sri Ram JCA said:

> In our judgment, the manner in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substance, perhaps, drugs or perhaps some other substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew the packets contained heroin, the drug which forms the subject matter of the charge.

[10] There is, if at all, very seldom available direct proof of the knowledge that is necessary to constitute possession. In almost every case, proof of knowledge has to be by way of inference from the proven circumstances. One set of circumstances differs from another. In any given case, whether knowledge is inferable depends on the particular circumstances of the case and a proper appreciation of them. We have to look at the particular circumstances of this case and assess them independently, without being influenced by what may have been decided in some other case under a different set of circumstances. For that reason we consider that the decision in *Toh Su Kuan* is not relevant for our deliberations.

[11] In the present case, the inescapable inference from the fact that the bag was so placed in relation to the appellant in th e car as has been described can only be that he knew of the existence of the bag. From the fact that he allowed the bag to remain there while he was driving, whereas normally a driver would not allow an object to remain on the floor in his part of the car to be. a potential obstruction to his footwork while driving, the inescapable inference is that he willed the bag to be there in order to guard it and that therefore he was in custody or control of it. From the fact that it was his own car that he was driving and that there was no one else in the car, the inescapable inference is that he alone was concerned in the presence of the bag in the car. From the fact that he needed to guard the bag, the inescapable inference is that he knew that the bag contained packets of the dangerous drugs. It was not for the court, at the close of the prosecution case, to provide a defence for the appellant and

speculate on the probability that, for example, someone else had left the bag in the appellant's car without his knowledge. Unless there were elements in the evidence of the prosecution case itself pointing to such a probability, it must not be entertained. In this appeal nothing has been pointed out from the evidence for the prosecution as indicating, against the inescapable inference against him, a probability that the appellant had no knowledge of the existence of the drugs. We are therefore satisfied that the sessions court judge was right in finding at the close of the prosecution case that the prosecution had established possession by evidentiary proof, and we accordingly dismiss the appeal as regards conviction.

[12] Even if the proven circumstances were insufficient as proof of knowledge, we would apply the presumption of s 37(d). When we mooted the idea during the hearing of the appeal, Encik Karpal Singh was not able to argue convincingly against it. We are satisfied that the appellant had in his custody or in his control the bag and the packets containing the drugs. The presumption is a mandatory although rebuttable presumption. It has to be applied where the facts on which to base it are established, except in a capital charge of trafficking that relies on the statutory presumption of trafficking, because the Federal Court in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 held that it was wrong to use the presumption under s 37(d) to invoke the statutory presumption of trafficking. That must have been the reason why in *Toh Su Kuan*, the prosecution did not rely on the mandatory presumption of knowledge under s 37(d).

[13] We now turn to the question of the sentence. The appeal had to be against the period of imprisonment only, because the ten strokes of whipping that were imposed were mandatory. Encik Karpal Singh's point essentially was that the term of ten years is excessive in view of the amount of the drugs involved.

[14] The substance in this case was a mixture of heroin and monoacetylmorphines of total weight 6.44g. The offence was possession under s 12(2), The imprisonment imposed was ten years. If the amount is less than two grammes the penalty, according to s 12(3) read with s 39A(l)(d), is a fine not exceeding RM100,000 or imprisonment for any term not exceeding five years or both. If the amount is two grammes or more but less than five grammes,the penalty of imprisonment is mandatory and the term is, according to s 39A(1)(d), between two years and five years. So if the amount is 4.99g, imprisonment of five years would be justified. If the amount is five grammes or more but less than 15g, imprisonment is mandatory, and the term, according to s 39A(2)(d), is five years to life, which means 20 years. So if the amount is 5g, imprisonment for five years would be justified, and if the amount is 14.999g, imprisonment for life, that is twenty years, would be justified. If the amount is 15g or more, according to s 37(da)(iiia) trafficking is presumed, and the penalty for trafficking is death.

[15] There seems to be a statutory policy of grading the severity of penalty according to the amount of drug. Bearing that in mind, no matter how important are such questions as that of public interest, in a case that does not have aggravating or suchlike circumstances, such as a previous conviction — and the appellant does not have a previous conviction — the sentence of imprisonment must, as far as possible,

though not necessarily with mathematical accuracy, be made to adhere to that policy. It would be manifestly wrong, for example, although allowed by s 39A(2)(d), to sentence a first offender to life imprisonment for possession of a mere 5g, as it would be manifestly wrong, although so allowed, to sentence an offender, even though a first offender, to only five years for possession of 14.999g, in the absence of special mitigating circumstances.

[16] In this case, it does appear to us that imprisonment for half the maximum period of 20 years for possessing 1.44g more than the amount for which five years would be the proper penalty does deviate from the grading. Ten years would be justified for possession of 10g.

[17] We, however, do not agree with Encik Karpal Singh's argumentinsofar as it proceeds from beyond the statutory grading in that it uses for comparison the sentence in *Kesavan a/l Petchayo @ Balakrishnan v Public Prosecuto* [2003] 2 MLJ 209, which was eighteen years for possession of as much as 17g, more than three times the 'trigger point' of 5g for s 39A(2)(d). Encik Karpal's point was that if for 12g more than the trigger point the sentence was 18 years, for just 1.44g in excess of the trigger point the period should be reduced accordingly. That case was, however, a case where the accused was originally charged for trafficking by presumption from possession but the conviction was substituted on appeal with one for possession under s 12(2). Such a case, including cases where for some reason or other the prosecution decide not to charge for trafficking persons in possession of more than 15g, ought not to be used as comparison in determining the period of imprisonment for possession of less than 15g. The reason is that in such cases the amount could be any amount from 15g upwards, such as, for example, 1000g, and yet the maximum imprisonment possible remains at twenty years (life). But in view of our earlier observations about the statutory grading of penalties, we would reduce the term of imprisonment to seven years.

[18] Accordingly, while dismissing the appeal against conviction, we allow the appeal against sentence and reduce the term of imprisonment to seven years.

Appeal on conviction dismissed. Term of imprisonment reduced to seven years.

Reported by Loo Lai Mee